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999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6124

DATE COMPLAINT FILED: 10/27/2008

DATE OF NOTIFICATION: 11/6/2008

LAST RESPONSE RECEIVED: 1/5/2009

DATE ACTIVATED: 3/10/2009

EXPIRATION OF SOL: 6/3/2013

COMPLAINANTS:

National Right to Work Legal Defense
and Education Foundation, Inc.

Karen Glass

Michael R. Casaretto

RESPONDENTS:

Service Employees International Union
SEIU Committee on Political Education
and Anna Burger, in her official capacity as
treasurer

RELEVANT STATUTE
AND REGULATION:

2 U.S.C. § 441b(b)(3)

11 C.F.R. § 114.5(a)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that a provision in the Service Employees International Union ("SEIU") constitution, which imposes financial penalties on local unions that do not meet the SEIU's annual fundraising goals for the SEIU Committee on Political Education ("SEIU COPE"), constitutes a financial reprisal or a threat thereof by SEIU, in violation of 2 U.S.C. § 441b(b)(3)(A), a provision of the Federal Election Campaign Act of 1971, as amended ("the Act").

1 It appears that the provision at issue constitutes a solicitation for contributions to SEIU
2 COPE, and yet fails to meet the Act's requirements for voluntariness. Therefore, we recommend
3 that the Commission find reason to believe that SEIU violated 2 U.S.C. § 441b(b)(3) and
4 11 C.F.R. § 114.5(a) by failing to include the required notices in a solicitation for a separate
5 segregated fund. We also recommend that the Commission find reason to believe that SEIU
6 COPE violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a) by making contributions and
7 expenditures using funds secured by the threat of a financial reprisal.

8 **II. FACTUAL AND LEGAL ANALYSIS**

9 **A. Background**

10 SEIU is a labor organization that represents two million workers and has over 300 SEIU
11 local union affiliates. See <http://www.seiu.org/a/ourunion/fast-facts.php> (last accessed on
12 November 9, 2009). SEIU maintains a separate segregated fund, SEIU COPE. The complaint
13 identifies one of the complainants, Karen Glass, as a food service employee of a school district in
14 Wisconsin and a member of a bargaining unit represented by SEIU Local 150.¹ Complaint at 1.
15 According to the complaint, Ms. Glass is required as a condition of employment to provide
16 financial support to her local SEIU union. In addition, the majority of SEIU general treasury
17 funds comes from employees who are covered under collective bargaining agreements and who
18 must join or financially support SEIU as a condition of employment. *Id.* at 1-2.

19 The complaint alleges that a constitutional amendment passed by SEIU in 2008
20 constitutes a financial reprisal or the threat thereof, in violation of 2 U.S.C. § 441b(b)(3)(A). *Id.*

¹ The other complainants are the National Right to Work Legal Defense and Education Foundation, Inc., which identifies itself as an organization that represents "employees who suffer an abuse of compulsory unionism" defined here as "the mis-expenditure of the dues and fees of employees who are required to join or financially support a labor union as a condition of employment," and Michael R. Casaretto, who is identified as a law student "who has researched the matters set forth in this complaint and has verified his findings in this complaint." Complaint at 1.

1 at 2. Specifically, the complaint states that at the 2008 SEIU convention, SEIU amended section
2 18a of Article XV of the SEIU constitution, entitled "Duties of Local Unions," to impose a
3 financial penalty on local unions that fail to meet the "annual SEIU COPE fundraising
4 obligation." The provision states:

5 Section 18a. Every U.S. Local Union shall contribute an annual
6 amount equivalent to at least \$6.00 per member per year or as
7 determined annually by the International Executive Board to
8 support the overall SEIU political education and action program.
9 This annual SEIU C.O.P.E. fundraising obligation may be satisfied
10 by voluntary member contributions to SEIU C.O.P.E. or a
11 designated organization approved by the International President or
12 a combination thereof. All contributions to SEIU C.O.P.E.
13 collected by local unions shall be sent to SEIU C.O.P.E. Any
14 contributions in excess of \$6.00 per member per year or such other
15 amount as determined by the International Executive Board shall
16 be returned to the local union for its political program. If a local
17 Union fails to meet its annual SEIU C.O.P.E. fundraising
18 obligation, it shall contribute an amount in local union funds equal
19 to the deficiency plus 50%, or such other amount determined by
20 the International Executive Board, to support the overall SEIU
21 political education and action program.

22
23 b. A goal of every local union shall be to enroll and maintain at
24 least 20 percent of its members as voluntary participants in an
25 employer check-off or regular deduction program assigned to
26 SEIU C.O.P.E. or to an organization approved by the International
27 President.

28
29 See Text of Amended Section 18 of Article XV, Complaint at 5. The SEIU Constitution and
30 Bylaws, including the relevant provision, are available to the public through the SEIU's website
31 at <http://www.seiu.org/a/ourunion/constitution-and-bylaws.php> (last accessed on October 23,
32 2009).

33 The complaint avers that based on this provision, SEIU anticipates receiving at least nine
34 million dollars from local unions to support SEIU COPE (using current membership levels and

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1 required amount per employee). *Id.* at 2. As a result, the complaint argues, "SEIU COPE funds
2 are being contributed, not freely, but out of fear of imposition of a financial penalty." *Id.*

3 In response to the complaint, SEIU argues that the complaint fails to state any basis for
4 finding that the 2008 amendment to the SEIU constitution violates the Act. SEIU Response at 2.
5 As background, SEIU asserts that the provision incorporates a long-standing SEIU policy from
6 as early as 2000. *Id.* at 2, Robert Hauptmann Decl. at ¶ 3. SEIU further asserts that
7 notwithstanding this policy, no SEIU members have filed a complaint, except for the complaint
8 in MUR 5437, where the Commission took no further action after conducting an investigation,
9 finding "a lack of evidence to substantiate and quantify any potential violations of the Act." *Id.*
10 at 2; see General Counsel's Report #3, dated April 18, 2007 and Certification dated April 24,
11 2007.²

12 SEIU also argues that "there is no reason to assume" that the provision at issue might
13 lead local unions to use coercion to obtain contributions or that the provision would be sufficient
14 by itself to find a violation of the Act. SEIU Response at 2. SEIU asserts that local unions can
15 easily satisfy the SEIU COPE fundraising obligation, stating: "Assuming an average annual
16 contribution of \$48.00 per member, only 1/8th of a local's members need contribute to COPE for
17 the union to meet the \$6.00 per member goal," adding that Local 150, where Ms. Glass is
18 employed, has easily met the fundraising obligation. *Id.* SEIU also asserts that the provision at
19 issue "encourages SEIU local unions to raise voluntary contributions" and that such fundraising
20 is legal under Commission regulations, noting that unions may include a suggested guideline for
21 contributions and may also encourage contributions by sponsoring fundraising events. *Id.* at 2-3.

² MUR 5437 involved allegations that a local union had coerced its members to contribute to SEIU COPE and forced its employees to work for political campaigns. See Factual and Legal Analysis (SEIU/SEIU COPE) and Certification dated September 29, 2004.

SEIU asserts that it complies fully with Commission regulations to ensure the voluntariness of contributions by informing its members that they are not required to contribute to SEIU COPE as a condition of membership in the union, that members may contribute more or less than any suggested amount, and that contributions are for political purposes. SEIU Response at 3. In addition, its members must affirmatively agree to make a contribution (i.e. no reverse checkoff is used). *Id.* SEIU notes that the complaint does not allege that SEIU has failed to comply with these voluntariness requirements, which ensure that the fundraising obligation in the constitution does not result in involuntary contributions. *Id.* Finally, SEIU asserts that the complaint does not identify any SEIU member who has been coerced into contributing to SEIU COPE because of the amendment or for other reasons, and that Ms. Glass does not allege that she has contributed to, or has ever been solicited to contribute to, SEIU COPE. *Id.* at 2.

B. Analysis

The Act prohibits any labor organization from making "a contribution or an expenditure in connection with any election at which presidential ... electors or a Senator or Representative in ... Congress are to be voted for..." 2 U.S.C. § 441b(a). However, a labor organization, such as the SEIU, may use its general treasury funds to establish, administer, and solicit contributions to a separate segregated fund ("SSF") to be utilized for political purposes. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5(b). For any union federation with which a local union is affiliated, the local union is a "collecting agent" when it engages in collecting and transmitting contributions on behalf of the federation's SSF. 11 C.F.R. § 102.6(b).

Solicitations for or from the SSF must meet the requirements of voluntariness set out at 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a). Specifically, a solicitation must: (1) not secure contributions by physical force, job discrimination, financial reprisals, or the threat thereof; or by

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1 dues or fees required for membership in the labor union, required as a condition of employment,
2 or funds obtained in a commercial transaction; (2) inform those solicited of the political purposes
3 of such a fund at the time of solicitation; and (3) inform those solicited that refusal to contribute
4 shall not result in any reprisals.

5 Thus, the threshold question for determining whether there is an unlawful solicitation in
6 this matter is whether section 18(a) of Article XV of the SEIU constitution contains a
7 "solicitation" under the Act. If the provision does contain a solicitation, the next questions are
8 whether the solicitation has proper disclaimers and whether response was coerced.

9 1. Solicitation

10 The provision of the SEIU Constitution and Bylaws at issue in this matter appears to be a
11 solicitation because it encourages the local union to meet the fundraising obligation in two ways.
12 First, the provision ties the fundraising obligation to the individual members by requiring each
13 local to "contribute an annual amount equivalent to at least \$6.00 per member per year", states
14 that the obligation "may be satisfied by voluntary member contributions to SEIU COPE", and
15 imposes a financial penalty equal to the "deficiency plus 50%" if the obligation is not met.
16 Second, the provision rewards local unions who surpass their goal by returning to the local, any
17 funds in excess of the contribution obligation.

18 These two aspects of the provision encourage individual members to help meet the
19 local's obligation through their own contributions to COPE so that the local has more money
20 available to carry out its goals at the local level. As the locals themselves cannot contribute to
21 the SSF, *see* 2 U.S.C. § 441b(a), and are merely collecting agents for the larger union, *see*
22 11 C.F.R. § 102.6(b), the fundraising obligation ultimately is borne by the members themselves.

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1 Indeed, SEIU acknowledges that the provision "encourages SEIU local unions to raise voluntary
2 contributions to SEIU COPE." See Response at 2.

3 A determination that the provision at issue in this matter is a solicitation is consistent
4 with Commission advisory opinions providing guidance as to what constitutes a solicitation
5 pursuant to 441b, and with past enforcement matters. In Advisory Opinion 1976-27 (Bread
6 Political Action Committee), the Commission, citing to the relevant legislative history of 441b,
7 advised that communications informing persons of a fundraising activity, including
8 communications that encourage or facilitate contributions to the SSF, are solicitations under
9 2 U.S.C. § 441b. The Commission determined that any of the following specific activities
10 would constitute a solicitation: sending out notices to the membership about an upcoming
11 fundraiser, attaching a contribution/pledge form to the notices, mentioning a fundraiser in
12 mailings or in meetings, or setting up a sign asking persons to inquire about a fundraiser.³ In
13 Advisory Opinion 1976-96 (Saving Bankers Non-Partisan Political Action Committee) the
14 Commission further advised that informing meeting attendees of PAC activities or telling them
15 of a booth on the premises where solicitation materials are available would also constitute a
16 solicitation. The opinion cited to Representative Hays' statement in the legislative history that

³ In support of its conclusion, the Commission cited to a floor discussion among Senators Allen, Cannon and Packwood concerning what is a solicitation under 2 U.S.C. § 441b(b)(4)(B). The relevant portions of the discussion among Senators Allen, Cannon, and Packwood are as follows:

MR. ALLEN: When they announce setting up the fund, obviously, that is a solicitation right there

MR. PACKWOOD: The union sends out a mailing, the corporation does, and says, "Please join our political action committee," that would fit as one of the two solicitations they are entitled to make in a year.

MR. CANNON: If it is sent out in writing in accordance with this Provision of the Act, that certainly would constitute one of the two solicitations.

1 "[W]e determined that any action [that] could fairly be considered a request for a contribution
2 should be treated as a solicitation."⁴ See also Advisory Opinion 1999-6 (National Rural Letter
3 Carriers' Association) (magazine article describing process for employee to establish automatic
4 deductions to an SSF, providing a telephone number to call for additional information, and
5 referencing the convenience and advantages of using an automatic deduction system is a
6 solicitation); Advisory Opinion 1979-13 (Raymond International Inc. Employees' Political
7 Action Committee) (corporate newsletter describing fundraising activities of the SSF and
8 commending the enthusiasm of employees who participated in the fund's activities is a
9 solicitation).

10 In contrast, if the communication merely mentions the SSF or only engenders inquiry but
11 does not encourage contributions, the communication is not a solicitation. See, e.g., Advisory
12 Opinion 2000-07 (Alcatel USA, Inc. PAC) (statement on corporate intranet generally describing
13 functions of SSF is not a solicitation) and Advisory Opinion 1983-38 (DuPont Good
14 Government Fund) (article in company publication announcing formation of SSF and discussing
15 general factual information is not a solicitation).⁵ In MUR 5681 (High Point Regional

⁴ But see dissenting Statement of Reasons by Commissioner von Spakovsky in MUR 5681 (High Point Regional Association of Realtors) ("Describing the activities of a separate segregated fund, generally encouraging its support, or commending those who do support it, is simply not a "solicitation" as that term is commonly understood . . . [and] [s]uch activity should never have been considered to satisfy Representative Hays' standard noted in the legislative history, that a 'solicitation' is 'any action [that] could fairly be considered a request for a contribution' . . . the facts as outlined [in Advisory Opinion 1979-13] can in no way 'fairly be considered a request for a contribution.'")

⁵ See also MUR 6100 (Covanta Energy Corp.) (finding that text in an employee handbook stating the existence of a PAC and stating that contributions are voluntary, without more, is not a solicitation because it does not encourage employees to support PAC activities or facilitate the making of contributions to the PAC.) In MUR 6100, the Commission found no reason to believe that respondents violated the Act and closed the file. See Certification dated April 2, 2009. The Complainant has filed suit under 2 U.S.C. § 437g(a)(8) challenging the Commission's dismissal of the complaint. See *Utility Workers Union of America, Local 369 AFL-CIO v. Federal Election Commission Civil Action*, No. ___, (D.D.C. filed June 1, 2009). On March 8, 2010, the District Court remanded this case to the Commission "to supply a reasoned analysis for its dismissal of Local 369's complaint in a manner consistent with the [1977] E&J [for 11 C.F.R.114.5]."

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1 Association of Realtors), the Commission determined that a regional realtor's Association
2 solicited contributions to the PAC of its National Association when it included an advertisement
3 in its monthly newsletter which encouraged members to make contributions to the PAC and
4 listed all association members who had not yet made contributions, and when it projected that list
5 on a screen at the Association's monthly meetings. *See also* MUR 5337 (First Consumers
6 National Bank); MUR 5931/ADR 480 (Sumter Electric Cooperative Inc.) (Commission failed by
7 a vote of 3-3 to find reason to believe and authorize an investigation into whether SECO violated
8 the Act when it issued communications expressing disappointment with employees who ceased
9 their contributions to the PAC and requesting that they reconsider that decision, but referred the
10 matter to the Alternative Dispute Resolution Office and entered into a negotiated settlement in
11 which SECO "acknowledge[d] some employee solicitations may not have contained the
12 complete disclaimer language required by the FECA").⁶

⁶ As required by the U.S. Court of Appeals for the D.C. Circuit in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005) ("Shays I"), in 2006 the Commission re-defined "to solicit" at 11 C.F.R. § 300.2(m) in the context of regulations on raising and spending Federal and non-Federal funds. That provision defines "to solicit" as "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution ... A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution ... A solicitation may be made directly or indirectly." 11 C.F.R. § 300.2(m). While this definition does not appear to be inconsistent with the definition of solicitation that is applied in the context of corporate and labor organization activity, because not required by the Court in *Shays I*, the Commission explicitly decided to leave the terms "solicitation" and "to solicit" undefined in the regulations governing corporate and labor organization activity at 11 C.F.R. Part 114, and instead pointed to "a number of advisory opinions that already explain what would or would not constitute a solicitation of contributions to a corporation's separate segregated fund," including many of those discussed herein. 11 C.F.R. § 300.2(m); Final Rule and Explanation and Justification, Definitions of "Solicit" and "Direct", 71 Fed. Reg. 13,931-2 (Mar. 20, 2006).

1 This SEIU constitutional provision also stands in contrast to the facts presented in
2 advisory opinions where the Commission found a particular proposed communication was not a
3 solicitation, but merely conveyed information about the existence of the SSF without additional
4 encouragement, explicit or implicit, to contribute. *See, e.g.*, Advisory Opinions 1983-38
5 (DuPont Good Government Fund) (articles not a solicitation because limited to factual matters
6 about the fund, do not praise employees for making contributions, encourage their participation,
7 or facilitate the making of contributions) and 1979-66 (Associated General Contractors Political
8 Action Committee) (notice not a solicitation because it does not encourage its readers to support
9 the PAC's activities or provide information on how to contribute to the PAC).

10 Therefore, because Amended Section 18a of Article XV of the SEIU Constitution
11 encourages contributions to SEIU COPE, it appears to constitute a solicitation under the Act.⁷

12 2. Voluntariness

13 Pursuant to 2 U.S.C. § 441b(b)(3), it is unlawful to make a contribution or expenditure by
14 utilizing money or anything of value secured by, *inter alia*, financial reprisals or the threat
15 thereof; and it is unlawful for any person soliciting an employee for a contribution to fail to
16 inform such employee of the political purposes of such fund at the time of the solicitation, or of
17 his right to refuse to contribute without reprisal. *See also* 11 C.F.R. § 114.5(a). Moreover, if the
18 solicitation suggests a guideline for contributions, it must make clear that the guidelines are
19 merely suggestions, that the individual may contribute more or less than the guidelines suggest,

⁷ The SEIU Constitution and Bylaws, including the relevant provision, are available to the public through the SEIU's website at <http://www.seiu.org/s/ourunion/constitution-and-bylaws.php> (last accessed on October 23, 2009). The conclusion that the provision at issue appears to be a solicitation raises the issue of whether Respondents have violated 2 U.S.C. § 441b(b)(4)(A)(ii) and 11 C.F.R. § 114.5(g)(2) for soliciting contributions to the SEIU COPE from any person other than its members and executive or administrative personnel, and their families. However, because the solicitation status arises out of encouragement in the form of threats of financial penalty and promise of financial reward that would have little to no impact on those outside of the restricted class, because they are not subject to the penalties or rewards, we do not recommend that the Commission find reason to believe that the solicitation violated those provisions.

1 and that the labor organization will not favor or disfavor anyone based on the amount of his or
2 her contribution or the decision not to contribute. 11 C.F.R. § 114.5(a), *see e.g.*, MUR 5379
3 (Alex Penelas US Senate Campaign, *et al.*) (communication was coercive which indicated
4 recipients would be "expected" to contribute, claimed to set a "deadline" for contributions,
5 suggested that it would be less painful for recipients to contribute now rather than tomorrow, and
6 noted that the president of the company planned to monitor who contributed); MUR 5208
7 (Jersey Bankers Political Action Committee) (solicitation was coercive which did not inform the
8 solicitee that he or she could contribute more or less than the suggested amount or that the PAC
9 would not favor or disadvantage anyone based on amount or absence of contribution); MUR
10 5681 (High Point Realtors) (solicitations lacked proper notice of the political purposes of the
11 SSF and the member's right to refuse to contribute without reprisal); and MUR 5337 (First
12 Consumers National Bank) (solicitations lacked proper notice of voluntary nature of contribution
13 or amount of contribution).⁸

14 In this matter, the solicitation in the constitutional amendment appears to violate 2 U.S.C.
15 § 441b(b)(3) and 11 C.F.R. § 114.5(a) in two ways. First, although prohibited by those
16 provisions, the solicitation threatens a financial penalty to be paid from "local union funds" if the
17 fundraising obligation set forth in the provision is not met. As a result, any contributions or
18 expenditures made with funds secured by the solicitation are prohibited. Second, the provision
19 does not contain the required disclaimer notice provisions informing solicitees of the SSF's
20 political purpose or of the right to refuse to contribute without reprisal. The provision also sets a
21 minimum overall contribution amount equivalent to "at least \$6.00 per member per year," which
22 may be taken as a suggested minimum contribution amount for potential contributors. However,

⁸ See also MUR 5931/ADR 480 (Sumter Electric Cooperative Inc.), discussed *supra* at p. 9.

1 it does not inform potential donors that they may give more or less than the minimum
2 contribution amount without their choice resulting in favor or disfavor by the union. While the
3 response argues, without supporting information, that SEIU complies with voluntariness
4 requirements when soliciting contributions to SEIU COPE, this particular solicitation does not
5 meet these requirements because the Act and Commission regulations require the disclaimers to
6 be made "at the time of the solicitation," i.e. the requirements would need to be written into the
7 provision of the SEIU constitution or otherwise communicated contemporaneously with the
8 reading of the constitution. 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a)(3)-(5).

9 Accordingly, for the foregoing reasons, we recommend that the Commission find reason
10 to believe that SEIU, SEIU COPE and Anna Burger, in her official capacity as treasurer, violated
11 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a).

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13 We do not believe an investigation is necessary in this matter.
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IV. RECOMMENDATIONS

1. Find reason to believe that the Service Employees International Union violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a).
2. Find reason to believe that the Service Employees International Union Committee on Political Education and Anna Burger, in her official capacity violated 2 U.S.C. § 441b(b)(3) and 11 C.F.R. § 114.5(a).
3. Approve the attached Factual and Legal Analysis.
- 4.
5. Approve the attached proposed Conciliation Agreement.
6. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

3-3-10
Date

BY: K. M. Guith
Kathleen M. Guith
Deputy Associate General Counsel for
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Audra Hale-Maddox
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